IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 215 OF 1991

Dhondi Rama Bhalekar, deceased by his heirs -

1. Ramchandra Dhondiba Bhalekar age 32 yrs. Occ. Service, Residence - Building No.17, Room No.48, 5th floor, Mahim, Bombay - 19.

2. Parashram Dhondiba Bhalekar age 29 yrs., Occ. Service, residing as above.

3. Sadanand Dhondiba Bhalekar age 25 yrs., Occ. Service, residence as above.

4. Sou. Shanta Shivaji Patil age 30 yrs., Occ. Household, Shipur (Nesari), Tal. Gadhinglaj.

5. Sou. Shevanta Shivaji Patil age 22, Occ. Household, residence as above.

6. Smt. Gangubai Dhondiba Bhalekar age 53 yrs., Occ. Household R/o Shipur (Nesari), Tal. Gadhinglaj.
.. Appellants
(Heirs of Org. Deft. No.2)

Vs.

1. Pradip Ramchandra Mutalik Desai age 20 yrs. Occ. Student, Residing at 3434, Gondhali Gally, Belgaum.

2. Gangaram Lingoji Patil age 52, Occ. Agriculture, residing at Hatkanangale, Tal. Gadhinglaj. .. Respondents

(Org. Plft. & Deft.No.1)

Mr. N.V. Walawalkar for appellants.
Ms. S.S. Gokhale for Respondent No.1
Respondent No.2 though served, absent.

CORAM: B.H. MARLAPALLE, J.

Date : December 16, 2005.

ORAL JUDGMENT:

1. While admitting this second appeal on 16/4/1991, the following substantial questions of law have been framed for consideration:-

(a) It was an error of law to hold that the jurisdiction of the Civil Court was barred by virtue of the provisions of Section 85 of the Bombay Tenancy and Agricultural Lands Act, 1948, even when it was apparent from the judgments of the tenancy authorities against the appellants that the same were given contrary to the provisions of the law.

(b) The Lower Appellate Court erred in holding that it could not consider the question of legality or nullity of the judgments of the tenancy authorities against the appellants, even when the same were given by disregarding the procedure laid down by the said Act and in gross violation of those provisions.

(c) The judgments in tenancy cases by the tenancy authorities were patently illegal, without jurisdiction and wrong in law and resulted into failure of justice to the appellants, the Civil Court erred in holding that it had no jurisdiction to consider the validity and legality of the said judgments.

(d) The Lower Appellate Court ought to have seen and held that defendant no.2 was a lessee in the suit land and hence the suit filed without a notice to the second defendant under Section 106 of the Transfer of Property Act was not maintainable and in any event decree could not be passed for eviction of the appellants in such a suit.

1A. It is also pertinent to note that the appellants, in the memo of appeal, had also framed, inter alia, the following two issues for being considered as substantial questions of law:-

(a) The impugned decrees are erroneous, illegal and contrary to law.

(b) The impugned decree of the Lower Appellate Court is against the weight of evidence on record.

The additional issues are required to be considered, in view of the proviso below Section 100 of C.P.C. and the appeal succeeds on these issues, for the reasons discussed hereinbelow.

2. The land admeasuring 3 Hectares and 76 Ares located in R.S. No.32 of village Shipur in Taluka Gadhinglaj of Kolhapur District originally belonged to Balkrishna Desai and it was inherited by Smt.Shantabai wife of Sadashiv Mutalik Desai. It appears that the said land was put in possession of Dhondi Rama Bhalekar sometimes prior to the year 1954-55.

However, after the tiller's day i.e. 1/4/1957 the half portion on the eastern side of the said land was sold by the landlady to Shri Lingu Kabji Patil and this transaction appears to have taken place sometime in year 1959-60. Consequently, the remaining half portion on the western side remained in possession of Dhondi Rama Bhalekar. In the year 1961-62 the land owner filed proceedings under Section 70(b) of the Bombay Tenancy and Agricultural Lands Act, 1948 ("the Act" for short) for a negative declaration that Dhondi Rama Bhalekar was not a tenant of the suit land. These proceedings came to be registered as Tenancy Case No.94 of 1961-62 and the Avval Karkun, Gadhinglaj, acting as the Mamlatdar Court, allowed the application on 30/7/1962. Against the said order, a belated appeal came to be filed which was registered as Appeal No.70 of 1973 and it was allowed by the Sub Divisional Officer, Gadhinglaj Division, Gadhinglaj on 28/2/1974, by remanding the case to the Mamlatdar for fresh inquiry. This order passed by the SDO came to be challenged by the land owner before the Maharashtra Revenue Tribunal, Kolhapur and the revision came to be registered as MRT.KP.120/75 and the same was allowed by the Judgment and Order dated 17/12/1975 holding

that the appeal filed by the occupant before the SDO was not maintainable under Section 74 of the Act.

2A. In the meanwhile, on the remand made by the SDO, the Tahsildar proceeded to fix the purchase price of the suit land under Section 32-G of the Act vide his order dated 21/3/1973. This order came to be challenged by the land owner in Tenancy Appeal No.30 of 1975 and it was allowed. Thus, the order passed by the Avval Karkun in Tenancy Case No.94/1961-62 on 30/7/1962 reached its finality.

3. The land owner approached the Civil Court in Regular Civil Suit No.127 of 1982 and prayed for restoration of the suit land as well as the mesne profit of Rs.1200/- (at the rate of Rs.400/- per annum), on the ground that the occupant i.e. defendant no.2 had illegally started cultivation of the suit land. The defendant no.1 was Gangaram Lingioji Patil who had purchased the eastern half portion of the land. The defendant no.2 (the present appellant) filed his Written Statement and opposed the suit on the ground that the land was under cultivation right from the beginning and he had become a deemed

tenant over the suit land. The learned Civil Judge, Jr. Division at Gadhinglaj decreed the suit vide his Judgment and Order dated 29/8/1985 by directing the defendant no.2 to hand over the vacant possession of the suit land to the plaintiff and to pay an amount of Rs.1200/- by way of mesne profit. This decree came to be challenged by the present appellants in Regular Civil Appeal No.314 of 1985 and the learned 5th Additional District Judge, Kolhapur was pleased to dismiss the same vide his Judgment and Order dated 31/1/1991. The trial court held that the suit was tenable and the defendant no.2 was illegally and without the consent of the land owner had cultivated the suit land. The trial court further proceeded to hold that the defendant no.2 was in illegal possession of the suit land and the plaintiff was entitled for damages at the rate of Rs.400/- per annum for three years. It was further held that the defendant no.2 failed to prove that the decisions rendered in Tenancy Case No.94 of 1961-62 and Tenancy Appeal No.30 of 1975 were illegal. All these findings have been confirmed by the Lower Appellate Court while dismissing the appeal filed by the appellants.

4. Section 85 of the Act reads as under:-

> "85.**Bar of jurisdiction. --** (1) No Civil Court shall have jurisdiction to settle, decide or deal with any question including a question whether a person is or was at any time in the past a tenant and whether any such tenant is or should be deemed to have purchased from his landlord the land held by him which is by or under this Act required to be settled, decided or dealt with by the Mamlatdar or Tribunal, a Manager, the Collector or the Maharashtra Revenue Tribunal in appeal or revision or the State Government in exercise of their powers of control.
>
> (2) No order of the Mamlatdar, the Tribunal, the Collector or the Maharashtra Revenue Tribunal or the State Government made under this Act shall be questioned in any Civil or Criminal Court.
>
> Explanation.- For the purpose of this section a Civil Court shall include a Mamlatdar's Court constituted under the Mamlatdars' Courts Act, 1906."

4A. It has two parts, namely, (a) No Civil Court shall have jurisdiction to settle, decide or deal with any question including the tenancy status of a person and (b) no order of the Mamlatdar, the Tribunal, the Collector or the Maharashtra Revenue Tribunal or the State Government made under the Act shall be questioned in any Civil or Criminal Court. As noted earlier, the order passed by the Avval Karkun on

30/7/1962 had received its finality. The said order held that, (a) the suit land was used by Dhondi for the purpose of grazing cattle and the grass that was grown in the suit land had grown naturally and, therefore, the suit land could not be considered to be an agricultural land, (b) Dhondi could not be held to be cultivating the land as it was practically Varkas and fallow land used for grazing the cattle, (c) as the land was not agricultural and Dhondi could not be held to be cultivating it, the provisions of the Act would not apply to the land in his possession i.e. half portion admeasuring 4 Acres 26 Gunthas located on the western side.

5. It must be noted at this stage that the Avval Karkun did not hold that Dhondi was an illegal occupant or he was not a tenant over the suit land. As per the scheme of Section 85 (2) of the Act these findings could not questioned in the civil suit instituted by the land owner i.e. R.C.S. No.127 of 1982. The said suit was, therefore, required to be decided on the basis of the pleadings made by the plaintiff himself, namely, (a) the defendant no.2 had started cultivating the land illegally and against the

breach of the terms of the agreement/contract, (b) on such breach of contract, the land owner was entitled to the resumption of land, under the said contract/agreement and (c) in the alternative he was entitled for restoration of the land under a statutory provision on the ground that the occupant had cultivated it without the land owner's permission. It was not open for both the courts below to adjudicate upon the decisions rendered by the revenue authorities, even though the defendant had raised such issues more so because the order passed by the Mamlatdar on 30/7/1962 had reached its finality against the said defendant. In any case, these issues raised by the defendant no.2 were not relevant for deciding the suit purely on the basis of the pleadings made by the plaintiff himself and more particularly in para 5 of the plaint. The official translation of the said para 5 of the plaint reads as under:-

> "5. The defendant No.2 by violating the original agreement for cutting the grass and without the knowledge and permission of the plaintiff, unauthorisedly started cultivating

the suit property. The defendant No.2 is carrying on vahiwat (management) in the suit property unauthorisedly (without any right). When the defendant No.2 was informed (asked) to quit the vahiwat and to give the possession in favour of the plaintiff, the defendant is avoiding. Hence the present suit is filed against the defendant to remove the unauthorised vahiwat being carried out by the defendant No.2, togetherwith (a claim to pay) income of Rs.400/- per annum, for the last three years (earned) from the suit property; and to dispossess the defendant and to give the possession thereof (suit property) to the plaintiff."

6. On behalf of the plaintiff-minor, his father Ramchandra had stepped in the witness box as P.W.1 (Exh.26) and on behalf of the defendant no.2, in addition to himself as D.W.1, one Arjun Bapu Patil was examined as D.W.2. This so called independent witness of the defendant no.2 in his examination-in-chief stated that he was the owner of the land adjacent to

the suit land and located on the southern side and, therefore, he was aware of the cultivation being carried out for about 20 years over the same land. However, in the cross-examination he admitted that his land was not adjacent to the suit land and that his daughter was married to the son of defendant no.2. He also admitted that his agricultural land was located in Gat No.555 as against Gat No. 153 of the suit land. This witness has, therefore, been rightly discarded by the trial court.

6A. The plaintiff either through his depositions or along with the plaint did not bring on record any documentary evidence to show that after the order was passed by the Avval Karkun in 1962 the defendant no.2 had started cultivation over the suit land or any time before the suit was filed or during the pendency of the suit. In the plaint, it was contended that the cultivation was undertaken before three years whereas in the witness box under cross-examination on 28/7/1985 he stated that the suit land was under cultivation since last 10 years. A copy of the agreement/contract between the land owner and Dhondi was not brought on record. Similarly, the notice for

termination of contract allegedly issued on any date prior to the filing of the suit was also not placed on record. In the plaint the relevant terms of the contract regarding permission to be obtained before undertaking the cultivation or breach of contract empowering the land owner to seek restoration of land were not set out. Both the courts below appeared to have shifted the burden on defendant no.2 to prove that he had undertaken the cultivation with permission. It was necessary for the courts below to first examine whether such a permission was required to be obtained under the contract/agreement and any failure to obtain such permission entitled the land owner for restoration of the land on the ground of breach of contract/agreement. No doubt, in his depositions the defendant no.2 stated that the land was under cultivation right from the beginning, but that by itself would not entitled the plaintiff to obtain a decree of ejectment of the defendant when the plaintiff himself was aware that the defendant no.2 was not an illegal occupant of the land. The order dated 30/7/1962 passed by the Avval Karkun did not state that Dhondi was an illegal occupant of the land. The said order specifically stated that the provisions

of the Act would not be applicable to the suit land and, therefore, it was necessary for the plaintiff to establish his right for a decree of restoration of the land either on the basis of the terms of the agreement/contract by which the suit land was originally handed over to Dhondi on lease or on the basis of a statutory provision he was entitled for such a decree. Ms. Gokhale the learned counsel for the land owner urged before this court that such a right of the land owner requires to be inferred from the obtaining circumstances. These submissions do not have any force in law and it was necessary for the plaintiff to demonstrate his right for a decree of eviction of the tenant on the basis of the agreement/contract or any statutory provision. Both the courts below committed a manifest error in failing to consider this very foundation of the suit filed by the plaintiff and they seem to have been overwhelmed by the allegations that there was illegal cultivation. Illegal cultivation, even though accepted, by itself would not entitled the land owner for a decree of eviction unless the terms of the contract indicated so. Thus the concurrent view taken by both the courts below is unsustainable and the plaintiff has utterly

failed to make out a case for the decree of restoration of the suit land.

7. This case has an additional facet which both the courts below appeared to have missed. The plaintiff approached the trial court with an admission that the land was taken under cultivation 3 years before and while in the witness box he stated that it was taken under cultivation 10 years before. On the basis of these admissions itself the decision rendered by the Avval Karkun on 30/7/1962 lost its force, at least in the year 1975. The suit was moved in December, 1982 and unless the purported notice of termination was brought on record, it will have to be presumed that no such notice of termination was issued at any time from 1962 after the Avval Karkun passed an order and after 1975 when the cultivation was undertaken. Section 4 of the Act states that a person lawfully cultivating any land belonging to another persons shall be deemed to be a tenant if such land is not cultivated personally by the owner and if such person is not, (a) a member of the owner's family, or (b) a servant on wages payable in cash or kind but not in crop share or hired labourer cultivating the land

under the personal supervision of the owner of any member of the owner's family, or (c) a mortgagee in possession. The scope of Section 4 has been elaborately discussed by the Constitution Bench in the case of Dahya Lala and ors. vs. Rasul Mahomed Abdul Rahim and ors. reported in **AIR 1964 SC 1320** and their Lordships concluded their opinion in the following words:-

> "In our view, all persons other than those mentioned in Clauses (a), (b) and (c) of Section 4 of the Act who lawfully cultivate land belonging to other persons whether or not their authority is derived directly from the owner of the land, must be deemed tenants of the lands."

7A. It is thus evident that the land owner's case that the occupant had illegally cultivated the land could be put forth in the proceedings initiated under the Act for seeking the benefits therein i.e. a deemed tenant or purchase certificate under Section 32-M of the Act. In the absence of the agreement/contract being on record and containing such terms as would specifically state that breach of the same would result in dispossession of the occupant,

the suit could not have been entertained by the courts below and there is absolutely no evidence placed on record by the plaintiff in support of the claim so made. Thus the decrees passed by the courts below are, in the absence of any evidence, leave alone any reliable evidence, patently erroneous and have resulted into miscarriage of justice.

8. In the premises, this second appeal succeeds and the same is hereby allowed. The orders passed by both the courts below are hereby quashed and set aside and consequently Regular Civil Suit No.127 of 1982 hereby stands dismissed. It is further clarified that this order will not come in the way of any of the parties to exercise their rights, if any, by initiating proceedings under the Act.

(B.H. Marlapalle,J.)